

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

HONG PHAN,

Appellant.

No. 63968-4-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: July 26, 2010

Leach, J. — Hong Phan appeals a restitution order that requires him to pay over \$118,000 to his former landlord and her insurance company for damages caused by his marijuana grow operation. Because substantial evidence supports this order, we reject his challenge to the sufficiency of the evidence and affirm.

**Background**

In 2006, Darlene Jevne leased her home to Hong Phan for one year. When Jevne checked on her property at the end of the lease term, she discovered extensive moisture damage to the exterior of her home and what looked like a marijuana grow operation inside. She promptly called the police. When the police arrived, Jevne asked them to enter the house to investigate.

The officers immediately noticed significant damage to the house. The floors were covered in plastic with mounds of potting soil spread throughout

different rooms. Hangers in the ceiling appeared to have been used to hang grow lamps. They observed Mylar paper, stacks of pots, fertilizers and other chemicals in plastic carboys, water hoses, bundles of unused potting soil, venting ducts, packaging material, grow schedules, and documents with Phan's name on them strewn about the house. The officers also found 333.6 grams of processed and packaged marijuana.

Phan was subsequently arrested and charged with manufacturing marijuana in violation of the Uniform Controlled Substances Act, RCW 69.50.401(1), (2)(c). He pleaded guilty to the reduced charge of attempted manufacture of marijuana and received a 12-month suspended sentence with 24 months of supervised probation, conditioned on serving 30 days in electronic home detention and restitution to be set by a separate order. In a separate restitution order, he was ordered to pay \$31,184.43 to Jevne and \$86,905.37 to Jevne's insurer, USAA, with a direction to pay Jevne first.

Phan appeals the restitution order.

#### Standard of Review

A trial court's authority to impose restitution is derived from statute.<sup>1</sup> So long as the court's restitution order is authorized by statute, we will not disturb the order absent a manifest abuse of discretion.<sup>2</sup> A court abuses its discretion when it is exercised in a manifestly unreasonable manner or on untenable

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<sup>1</sup> State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

<sup>2</sup> State v. Thomas, 138 Wn. App. 78, 81, 155 P.3d 998 (2007).

grounds.<sup>3</sup>

### Analysis

Phan maintains that insufficient evidence supports the total amount of restitution ordered. He also asserts that Jevne opportunistically sought to pass on costs for home improvements not causally attributable to his attempted manufacture of marijuana. We disagree.

RCW 9.95.210(2)(b) authorizes the trial court to order restitution and provides:

The superior court may also require the defendant . . . to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question.

The “crime in question” is the one for which the defendant was convicted,<sup>4</sup> but restitution is not limited by the elements of the crime of conviction.<sup>5</sup> Restitution may be ordered for damages that are a “foreseeable consequence of the defendant’s criminal acts.”<sup>6</sup> Thus, the State must prove a causal connection between the “crime in question” and the restitution ordered.<sup>7</sup> This causal connection exists if “but for the criminal acts of the defendant, the victim would not have suffered the damages for which restitution is sought.”<sup>8</sup>

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<sup>3</sup> State v. Kinneman, 122 Wn. App. 850, 857, 95 P.3d 1277 (2004) (citing State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999)).

<sup>4</sup> State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834 (1998).

<sup>5</sup> State v. Taylor, 86 Wn. App. 442, 445, 936 P.2d 1218 (1997), overruled on other grounds by State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999) (citing State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992)).

<sup>6</sup> Landrum, 66 Wn. App. at 799 (interpreting a different but similar statute).

<sup>7</sup> Taylor, 86 Wn. App. at 445.

<sup>8</sup> Landrum, 66 Wn. App. at 799.

In assessing whether the criminal acts of the defendant are a but for cause of the victim's injury, the trial court examines facts admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or sentencing hearing.<sup>9</sup> If facts material to a restitution determination are disputed, the sentencing court must either disregard the disputed facts or hold an evidentiary hearing where the State bears the burden of proving damages by a preponderance of the evidence.<sup>10</sup> Evidence in support of restitution must be "substantial credible evidence" that provides the trial court with a reasonable basis for estimating the victim's loss<sup>11</sup> and provides the defendant with a sufficient basis for rebuttal.<sup>12</sup>

Generally proof of expenditures, without more, is an insufficient basis on which to order restitution.<sup>13</sup> But evidence is sufficient if it provides the trial court with a reasonable basis for estimating the victim's loss.<sup>14</sup> For example, in State v. Blanchfield,<sup>15</sup> the trial court imposed restitution for the victim's medical expenses incurred as a result of a domestic violence incident. Blanchfield argued on appeal that the victim's testimony along with the Crime Victims Compensation (CVC) Program report were insufficient to establish a causal

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<sup>9</sup> State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

<sup>10</sup> Dedonado, 99 Wn. App. at 256.

<sup>11</sup> State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994).

<sup>12</sup> State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993).

<sup>13</sup> See also State v. Bunner, 86 Wn. App. 158, 160, 936 P.2d 419 (1997) (reversing a restitution order as the only evidence was a summary report of medical expenditures from the Department of Social and Health Services).

<sup>14</sup> Fleming, 75 Wn. App. at 274.

<sup>15</sup> 126 Wn. App. 235, 239, 108 P.3d 173 (2005).

connection between the medical expenses and the assault.<sup>16</sup> The court disagreed, noting that the victim's testimony corroborated the CVC Program report and established that her emergency room and follow-up doctor visits were necessitated by the assault.<sup>17</sup> Accordingly, the court affirmed this part of the restitution order.

In this case, the State sought restitution for Jevne and USAA, Jevne's insurer. USAA paid for repairs and lost rent under a fire insurance policy. Because the total repair costs exceeded USAA's policy limits, Jevne expended considerable personal funds repairing her home.

At the restitution hearing, Jevne testified that she was the original owner and built the house with her father in 1964. Before leasing the house to Phan, "[t]he condition of the house was excellent, perfect, prestige. All the hardwood floors had been redone. It had been totally painted by the same person that had to repaint it. It was in perfect shape. . . . I had no problems whatsoever in the house." During Phan's occupation, the house sustained extensive damage.

She also testified as to the specific damages Phan caused to each room of her house and provided the court with copies of receipts for the repairs discussed. The high heat and humidity of the grow operation encouraged mold growth, which contaminated many of the home's walls and ceilings. In fact, the contamination was so bad in the upstairs bathroom that walls, floor, and some of the studs had to be replaced. She also hired a specialized contractor certified in

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<sup>16</sup> Blanchfield, 126 Wn. App. 241-42.

<sup>17</sup> Blanchfield, 126 Wn. App. at 242.

removing hazardous materials to deal with the mold problem.

Phan kept piles of potting soil in different rooms of the house. Jevne testified that the heat from the grow lamps caused the potting soil to release a sticky nicotine-like substance that stained the windows and the aluminum siding on the home's exterior. Because the stain could not be removed, she replaced the windows.

The floors throughout the home were also damaged. Moisture and heat buckled the hardwood floors, which were either replaced or refinished. Phan also drilled through the hardwood floor in the upstairs master bedroom for ventilation purposes, and two-year-old carpet, stained from soil and marijuana and full of holes, also had to be replaced.

Phan jackhammered through the cement floor in the basement to access the power lines and reroute the electric outlets in the house. In the process of rewiring the home, he punched holes in the walls and inadvertently punctured the furnace, rendering it inoperable. Jevne had to rewire the entire electrical system. And because Phan rerouted the plumbing from the upstairs bathroom, it had to be replumbed. Jevne also had to replace a toilet, counter top, and cabinets due to chemical stains. In addition, the entire interior of the house had to be repainted.

Jevne also testified that the condition of her house after repair was not as good as it was before she leased it to Phan as some of the destroyed materials were irreplaceable. For instance, the original wood floors were installed without

nails. Further, not all of the damages caused by Phan were fixed. The Formica counter top in the upstairs kitchen was damaged but not replaced, nor did she ask for restitution for the kitchen range though it too was damaged. She also testified that she did not attempt to replace items in good repair, like the bathroom mirror, linen shelves, and doors. In short, she was “not [t]here to take advantage of anyone.” She provided receipts for all the damages discussed.

Phan admitted that his actions were criminal and damaged Jevne’s home. At the hearing, he admitted that when he first occupied the house, “There was no visible damage.” He also testified that he wrapped the inside of the house in plastic and used 1,000 watt bulbs as a light source, which he concedes caused heat damage to the wood floors. He agreed to pay for the mold investigation and remediation costs plus the costs for electrical repair, but refused to pay any additional costs.

The State originally requested restitution in the approximate amount of \$80,000 for Jevne and \$113,000 to USAA, which included lost rent. After hearing testimony from the parties, examining photographic evidence, and reviewing billing receipts, the trial court reduced the amount of restitution to USAA to reflect a deductions in the amount of lost rent claimed and costs for replacement drapes. The judge also deducted \$23,000 for an amount already paid to Jevne. In addition, Jevne agreed not to seek restitution for landscaping fees, a hot water tank, and a kitchen range. The court ordered \$31,184.43 for Jevne and \$86,905.37 for USAA.

We conclude that a preponderance of evidence established a causal nexus between Phan's culpable conduct, attempting to grow marijuana in Jevne's home, and the full extent of restitution ordered.

Phan contends that the evidence adduced at the restitution hearing was insufficient to support any restitution beyond that which he agreed to pay.<sup>18</sup> Specifically, he complains about the absence of a move-in checklist and photographic evidence for the refrigerator, cabinets, and windows. He also points to a marble counter top in the bathroom where the previous one had been Formica.

Phan fundamentally misapprehends the applicable standard. The State need only provide substantial credible evidence that establishes a reasonable basis for estimating the victim's loss and provides the defendant with a sufficient basis for rebuttal.<sup>19</sup> Jevne's testimony, along with the invoices and billing receipts, meet this standard. Further, Phan cross-examined Jevne and had an opportunity to rebut evidence concerning the replacement value of the specific items he questions. He did not question Jevne about the comparative costs of the challenged marble counter and a Formica counter, nor did he present any

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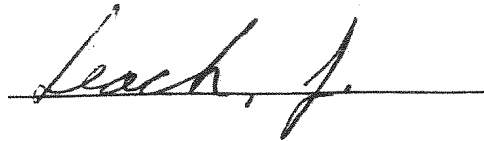
<sup>18</sup> For support, he cites to State v. Woods, where the court reversed an order of restitution for personal property taken from a stolen vehicle when the defendant was charged with possessing the stolen vehicle. Woods, however, is inapposite as it stands for the proposition that a sentencing court is precluded from imposing restitution for the defendant's "general scheme" or separate acts merely "connected with" the crime charged. Woods, 90 Wn. App. at 907-08. In contrast, this case turns on whether the evidence presented at the restitution hearing established a causal connection between retrofitting a rental property to grow marijuana and the subsequent damages sustained.

<sup>19</sup> Kisor, 68 Wn. App. at 620.

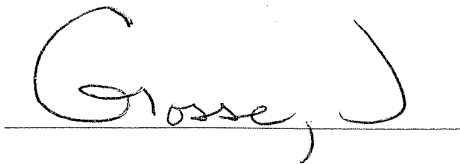
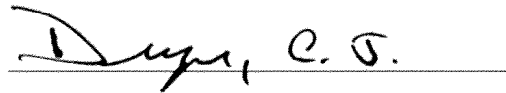
affirmative evidence of his own on this issue.<sup>20</sup> He presented no evidence that the replaced items could have been repaired or that the cabinets and windows were not in need of replacement.

In summary, the State provided substantial evidence sufficient to establish that Jevne's damages for which restitution was ordered, including those paid by USSA, were a foreseeable consequence of Phan's illegal grow operation. Phan failed to persuade the trial court that it should not believe this evidence. We cannot say that the trial court abused its discretion in believing it and ordering restitution as it did.

Affirmed.

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WE CONCUR:

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<sup>20</sup> Besides, the costs for the marble were negligible, accounting for \$337 of a \$5,000 bill.